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IN THE

Supreme Court of the United States

October Term 1971
No. 70-127

CECIL HICKS, District Attorney for the County of Orange, State of California; EDWARD J. ALLEN, Chief of Police, City of Santa Ana, State of California,

Appellants,

vs.

PLEASURE HOUSE, INC., a California corporation; and NORMAN ROBERT BLAKE,

Appellees.

On Appeal From the United States District Court for the Central District of California.

MOTION TO DISMISS OR AFFIRM.

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Appellees.

On Appeal From the United States District Court for the Central District of California.

MOTION TO DISMISS OR AFFIRM.

The appellees move the Court to dismiss the appeal herein on the ground that the appeal is not within the jurisdiction of this Court because not taken in conformity to statute or rules of the Court, or, in the alternative, to affirm the order of the district judge on the ground that the order of the said judge was clearly correct and that it is manifest under the particular record here presented that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

Opinions Below.

There was no opinion rendered by the District Court. As appears from Appendix A attached to appellants' Jurisdictional Statement, the appeal herein is solely from a temporary restraining order issued by a single district court judge.

Jurisdiction.

It is respectfully submitted that the appeal herein is not within the jurisdiction of this Court and is not taken in conformity to statute or to the rules of this Court. As discussed hereafter, reliance upon 28 U.S.C. §1253 as purportedly conferring jurisdiction on this Court of the appeal herein is unwarranted.

Questions Presented.

1. Whether an appeal from a temporary restraining order issued by a single district judge pursuant to 28 U.S.C. 2284(3) is within the jurisdiction of this Court, or whether such appeal, if reviewable at all, lies only with the court of appeals.

2. Whether the issuance of the temporary restraining order by the district judge pursuant to 28 U.S.C. 2284(3) pending the convening of a three-judge district court was correct, when the verified complaint and papers in support thereof requested injunctive relief against enforcement of state statutes upon substantial and non-frivolous grounds that the statutes were unconstitutional under the First, Fourth and Fourteenth Amendments; demonstrated direct, immediate, and irreparable injuries with threats to continue the same lawless conduct in the future; showed the massive and

repeated seizure of motion picture films, as well as the seizure of projectors not even mentioned in a search warrant; detailed repeated seizures without any prior adversary proceedings; showed that appellants had violated prior orders of the federal court holding seizures without adversary proceedings to be unconstitutional; and where all opportunity to vindicate appellees' constitutional claims were and are foreclosed by rulings of the highest courts of the State.

Statutes Involved.

The provisions of 28 U.S.C. §§2281 and 1253, the sections upon which appellants rely to support their jurisdictional claim are as follows:

> §2281. An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title.
>
> §1253. Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges.

Statement of the Case.

The action herein was commenced by the filing of a verified complaint in the United States District Court for the Central District of California, invoking the jurisdiction of the said court under 28 U.S.C. §§1331 and 1343. The action sought injunctive relief against deprivation of constitutional rights (42 U.S.C. §1983) and declaratory and injunctive relief upon the grounds that certain state statutes were unconstitutional on their face and as construed and applied. The complaint therefore invoked the three-judge court jurisdiction of the district court pursuant to 28 U.S.C. §§2281 and 2284.

Shortly after the case was filed, the Honorable Albert Lee Stephens, Jr., a Judge of the United States District Court for the Central District of California, certified a request to the Chief Judge of the Court of Appeals for the Ninth Circuit, requesting the designation of a statutory three-judge court. This certified request was made on February 9, 1971. On February 17, 1971, the said district judge entered a temporary restraining order pursuant to 28 U.S.C. §2284(3). It is this temporary restraining order from which the appellants appeal.

On or about April 12, 1971, appellants applied for a stay of the aforesaid temporary restraining order to a Justice of this Court. On April 26, 1971, Mr. Justice Brennan denied the application for a stay with the following endorsement thereon: "Application denied without prejudice to an application to the Court of Appeals."

The verified complaint alleged, among other things, that Pleasure House, Inc., exhibited motion picture films at its place of business to adults only, without intruding upon the privacy or sensibilities of the general

public; that pursuant to a search warrant, issued on or about January 21, 1971, without a prior adversary hearing, appellant Hicks and his agents seized 8 different motion picture films and, at the same time, seized 13 projectors used for viewing of motion picture films, although the said projectors were not mentioned in the search warrant; that the conduct of appellants had caused and threatened to cause substantial and irreparable injury to appellees; and that the true intent and purpose of appellants was to establish a censorship of the films, to impose prior restraints upon the exercise of freedom of expression, to harass appellees and exhaust their financial resources, to deny the public access to nonobscene films, and to subject appellees to arbitrary, capricious and irrational deprivation of liberty and property without due process of law, in violation of the free speech, due process and equal protection guarantees of the First, Fourth and Fourteenth Amendments to the United States Constitution.

The complaint also alleged that prior to the seizure of the 13 motion picture projectors and the films involved herein, appellant Hicks had been ordered by a different United States Judge for the Central District of California to return a different motion picture film seized without a prior adversary hearing; that the order of the said district judge was affirmed by the United States Court of Appeals for the Ninth Circuit on January 8, 1971. Thus, approximately two weeks after the Court of Appeals for the Ninth Circuit had explicitly ruled that appellants could not seize a motion picture film without a prior adversary hearing, appellant Hicks engaged in such lawless seizures, seizing not only 8 films, but also 13 projectors, the latter material not having even been mentioned in the search warrant ob-

tained by appellant. The purpose and intent to put appellees out of business by the lawless enforcement of the law, continual harassment and bad faith enforcement, even to the extent of violating final orders made by courts of law, were plainly manifested by the allegations contained in the verified complaint.

ARGUMENT.

1. The appeal herein is concededly an appeal from a temporary restraining order entered by a district judge pursuant to 28 U.S.C. §2284(3). A request to the Chief Judge of the Court of Appeals for the Ninth Circuit for the designation of a statutory three-judge court had been made shortly prior to the rendition of the said temporary restraining order. The appellants have merely appealed from the temporary restraining order and invoked jurisdiction under 28 U.S.C. §1253.

It is submitted that a direct appeal to this Court will lie only when a three judge court entertains a claim of invalidity by reason of unconstitutionality, determines the action on that ground alone, and grants or denies an injunction. It is submitted that where a single judge, as in the case herein, grants a temporary restraining order pending the convening of a three-judge court, review, if it exists at all, lies solely with the court of appeals. See, *Stratton v. St. Louis Southwestern Ry.*, 282 U.S. 10; *Idlewild Bon Voyage Liquor Corp. v. Epstein*, 370 U.S. 713; *Schackman v. Arnebergh*, 387 U.S. 427; *Wilson v. City of Port Lavaca*, 391 U.S. 353; *Mengelkoch v. Industrial Welfare Commission*, 393 U.S. 83; 9 Moore's Federal Practice (2d Ed. 1970) ¶ 110.03, 68-85; Currie, Appellate Review of the Decision Whether or not to Empanel a Three-Judge Federal Court, in 37 U. of Chi. L. Rev. 159-165 (1967).

In the light of the aforesaid, the appellees submit that the motion to dismiss the appeal upon the ground that the appeal is not within the jurisdiction of the Court should be granted.

2. In the alternative, the temporary restraining order entered by the court was clearly correct. The allegations of the verified complaint set forth substantial questions with respect to the constitutional validity of the state statutory search and seizure procedures and the state obscenity law. The complaint also alleged facts which establish that the appellees had been subjected to direct, immediate, and irreparable injuries, and that such great and irreparable harm was caused by appellants who threatened to continue their lawless conduct in the future. On this state of the record, substantial non-frivolous constitutional questions having been presented, the district judge appropriately notified the Chief Judge of the Court of Appeals for the Ninth Circuit that an application for injunctive relief against the enforcement of the state statutes had been presented and required the convening of a three-judge court. The district judge then granted a temporary restraining order to prevent irreparable damage, as provided under 28 U.S.C. §2284(3). At this point, appellants filed their appeal from the said temporary restraining order.

This is a case which requires full hearing and determination by a three-judge court. The bad faith harassment and discriminatory enforcement has been manifested by the repeated seizure and suppression of motion picture films by appellants, even to the extent of seizing the instrumentalities used for the viewing of motion picture films. The massive seizure of the projectors, which were not even mentioned in a search war-

rant, indicates a lawless disregard for the Constitution and a deliberate attempt to put appellees out of business under the guise of enforcing the state obscenity law. No adversary proceeding before the judicial officer was ever held prior to the seizure of these projectors. See, *United States v. Polak*, 312 F. Supp. 112, 116-118 (D.C. Pa. 1970).

The repeated seizures of the motion picture films were all made without any prior adversary hearing, contrary to the Constitution and the applicable decisions of this Court. *Quantity of Copies of Books v. Kansas*, 378 U.S. 205; *Marcus v. Search Warrants of Property*, 367 U.S. 717. At least six courts of appeals and an overwhelming number of district courts have stated that the requirement of a prior adversary hearing applies to film seizures as well as those of printed matter because there is the same danger of abridging the right of the public to unobstructed dissemination of nonobscene expression. *Berkview Amusement Corp. v. Cahn*, 416 F. 2d 410 (2 Cir. 1969), cert. denied 397 U.S. 920; *Tyrone, Inc. v. Wilkinson*, 410 F. 2d 639 (4 Cir. 1969), cert. denied 396 U.S. 985; *208 Cinema, Inc. v. Vergari*, 298 F. Supp. 1175 (D.C. N.Y. 1969), reversed in open court Oct. 9, 1969, ... F. 2d ... (2 Cir.) Docket No. 33997, cert. denied 90 S. Ct. 941; *United States v. Alexander*, 428 F. 2d 1169 (8 Cir. 1970); *Cambist Films, Inc. v Duggan*, 420 F. 2d 687 (3 Cir. 1969); *Metzger v. Pearcy*, 393 F. 2d 202 (7 Cir. 1968); *Dominick, Inc. v. Ferdon*, 426 F. 2d 643 (9 Cir. 1970), vacated and remanded

91 S. Ct. 1223. See also, *Turner v. Wilhelm*, 91 S. Ct. 919, denying certiorari after the decisions by the Court in *Perez, Younger*, etc., where a warrantless seizure of material without a prior adversary hearing was held violative of the rule in *Kansas*, 431 F. 2d 177 (8 Cir. 1970).

This is a situation where the State has been afforded every opportunity to correct constitutional defects but has specifically declined to do so. State procedures offer no hope of vindication of appellees' federal claims. Under rulings by the highest courts of the State, the state statutory search and seizure procedures are not violated by permitting the seizure and suppression of motion picture films without a prior adversary hearing in a judicial proceeding; motion picture films may be seized and suppressed solely on the basis of an *ex parte* determination of alleged "probable cause" by a police officer, and "probable cause" is the only issue in any subsequent restoration proceeding; there is no burden upon the State to initiate judicial review, and there is no time limitation on the suppression in advance of a final judicial determination and no assurance of a prompt, final judicial decision; and all speedy and expeditious review is denied. See, *Monica Theatre, Inc. v. Municipal Court*, 9 Cal. App. 3d 1, 88 Cal. Rptr. 71 (1970), hearing denied Calif. Sup. Ct., Sept. 11, 1970; *People v. Luros*, 4 Cal. 3d 84, 92 Cal. Rptr. 833 (1971).

In the light of the governing state law, the right to seek federal relief is plainly justified and relief un-

doubtedly should be granted since direct, immediate, and great irreparable harm can be established and the decisions of the state courts are plainly contrary to the Constitution and the interpretative decisions of this Court. See, in addition to cases previously cited, *Blount v. Rizzi*, 400 U.S. 410; *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58.

The appellants make no adequate denial of the bad faith harassment and discriminatory enforcement alleged in appellees' complaint. The appellants concede that no prior adversary hearing was ever afforded appellees, and insist that no prior adversary proceedings will be afforded in the future. It is also legally significant that appellants, prior to the time of these repeated seizures, had been ordered to return a different motion picture film seized without a prior adversary hearing. This prior order had been entered by a different district judge for the same district court (*Grove Press, Inc. v. Younger, et al.*, No. 69-2554-FW, Complaint, Par. XXIII) and this order of the district court was affirmed by the United States Court of Appeals for the Ninth Circuit (*Grove Press, Inc. v. Younger, et al.*, No. 26454). The order of the court of appeals was rendered on January 8, 1971, and, despite the fact that the court of appeals ruled that appellants could not seize a motion picture film without a prior adversary hearing, appellants, some two weeks later, proceeded to seize the 8 motion picture films and the 13 projectors involved in the proceeding herein. *Cf., Walker v. City of Birmingham*, 388 U.S. 307.

Conclusion.

WHEREFORE, appellees respectfully move the Court to dismiss the appeal herein on the ground that the appeal is not within the jurisdiction of this Court because not taken in conformity to statute or rules of the Court, or, in the alternative, to affirm the order of the district judge on the ground that the order of the said judge was clearly correct and that it is manifest under the particular record here presented that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

Respectfully submitted,

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